EFFECT OF THE RECENT BOYCOTT DECISIONS

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The immediate result of the recent boycott decisions has been a deluge of protests. Judges, unionists, and publicists have joined in a chorus of criticism as though some new doctrine had been expounded. But while the courts are undoubtedly safe in the assumption that they are following an antique line of decisions, certain vigorous dissenting opinions indicate the doubts which are beginning to afflict the judicial mind respecting the infallibility of ancient precedents. The further disapproval of the decisions by conservative men of affairs challenges consideration of the points involved in controversy and justifies the interest of the public in taking an inventory of the questions at issue.

The severest criticisms of the decisions have been offered by judges on the bench. In the case of *Gompers et al.* v. *The Buck's Stove and Range Company*, Chief Justice Shepard, of the Court of Appeals of the District of Columbia, dissented most vigorously from the majority decision of the court which affirmed the jail sentences imposed on Gompers, Morrison and Mitchell for the violation of the injunction issued by Justice Gould.[2] This sweeping injunction restrained the defendants "from printing, issuing, publishing or distributing through the mails, or in any other manner, any copies or copy of the 'American Federationist,' or any other printed or written newspaper, magazine, circular, letter or other document or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant, its business or its product in the 'We Don't Patronize,' or the 'Unfair' list of the defendants, . . . or which contains any reference to the complainant, its business or product in connection with the term 'Unfair' or with the 'We Don't Patronize' list, or with any other phrase, word or words of similar import, and from publishing or otherwise circulating, whether in writing or orally, any statement or notice of any kind or character

[1] *Gompers et al.* v. *Buck's Stove and Range Co.*, 1909, 33 App. D. C. 516.

[2] This injunction was issued Dec. 18, 1907, for text see: *Buck's Stove and Range Co.* v. *American Federation of Labor*, 1909, 36 Wash. L. R. 822, 833-834.

whatsoever, calling attention of the complainant's customers, or of dealers or tradesmen, or the public, to any boycott against the complainant, its business or its product, or that the same are, or were, or have been declared to be 'Unfair,' . . . or inducing any dealer, person, firm, or corporation, or the public, not to purchase, use, buy, trade in, deal in, or have in possession stoves, ranges, heating apparatus, or other product of the complainant."

Though recognizing that the defendants had obeyed the order of the court to the extent of removing the name of the complainant from the "Unfair" or "We Don't Patronize" list, the court of appeals affirmed the decree imposing jail sentence because the labor leaders had given further publicity to the boycott. In fact the very announcement of the decree of the court imposing sentence upon Gompers, Morrison and Mitchell augmented the boycott. Here was, indeed, an anomalous situation—the defendants placing themselves in further contempt of court because they gave publicity to the decree of the court against themselves. On this point the court of appeals said, "Gompers and Morrison published and circulated through the 'American Federationist' articles calling the attention of the members of the American Federation of Labor and their friends throughout the country to the injunction issued by the court below in such a manner as to cause their followers to disregard and disobey the same, the intended effect of which was to injure and interfere with complainant's business and the sale of its product, and to restrain the membership of the American Federation of Labor and the public generally from patronizing the complainant and to continue and maintain the boycott against the business of complainant."

With respect to these charges of contempt the defendants insisted that they were within their constitutional prerogatives; that freedom of speech and of the press could not be restrained by any writ of injunction; that since the writ restrained them from exercising their constitutional rights, it was wholly erroneous and void and beyond the power of any court to issue; and therefore the complaint against them should be dismissed.

In dissenting from the decision of the court of appeals which affirmed the jail sentences, Chief Justice Shepard sustained the material contentions of the defendants in vigorous and somewhat stinging language. After pointing out that the conviction was

largely based upon acts and "language used by the respondents in public meetings long antedating the commencement of the original suit, some occurring in the year 1897 and long before any controversy had arisen," the chief justice continued, "When we consider the severity of the sentence of Mitchell, I think it impossible to say that it was not founded in part upon declarations which long antedated the controversy with the complainant." In dissenting further the chief justice said, "There is another and stronger reason for my dissent so far as the respondents, Gompers and Morrison, are involved. The specific acts charged against them relate wholly to declarations and publications which violated the preliminary injunction as issued. I have heretofore expressed the opinion that so much of the injunction order was null and void, because opposed to the constitutional prohibition of any abridgment of the freedom of speech or of the press. (33 App. D. C., p. 129.)[3] Subsequent reflection has confirmed the views then expressed. I concede that the court had jurisdiction of the subject-matter of the controversy and of the parties, but I cannot agree that a decree rendered in excess of the power of the court—a power limited by express provision of the constitution—is merely erroneous and not absolutely void."[4]

The effect of this judicial criticism can scarcely be other than clarifying in the controversies still at issue between advocates of the peaceful boycott and the adherents of the injunction process in the settlement of labor disputes. Chief Justice Shepard seems to point the way for a line of decisions which may in the future distinguish clearly between lawful acts due to the incentive of self interest on the part of organized labor in conducting a peaceful boycott, and any unlawful acts which may be committed from a malicious or any other motive. Unionists insist that they are merely contending for rights ordinarily enjoyed by other men and that their right to strike and their right to dispose of their patronage as they wish are rights of which no court can lawfully deprive them. The labor leaders persistently quote the generalization in "Cooley's Torts" that "It is a part of every man's civil rights that he be left at liberty to

[3] *American Federation of Labor* v. *Buck's Stove and Range Co.*, 1909, 33 App. D. C. 83, 129.

[4] *Ex parte Lange*, 1873, 18 Wall. 163; *Ex parte Fisk*, 1885, 113 U. S. 713. *In re Snow*, 1887, 120 U. S 274; *In re Ayres*, 1887, 123 U. S. 443-485; *Re Neilson*, 1889, 131 U. S. 176-183.

refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern."[5]

To those who insist that there can be no such thing as a peaceful boycott, recent court decisions do not give uniform assent. There has been a tremendous evolution not only in public opinion but in judicial thought since the days when the boycott was defined by Judge Taft as, "A combination of many to cause a loss to one person by coercing others against their will to withdraw from him their beneficial business intercourse through threats that unless those others do so, the many will cause similar loss to them."[6] In *Mills* v. *United States Printing Company*, the Supreme Court of New York said, "It is not in the breast of the court to stamp as illegal a combination for the betterment of the interests of the members thereof, or some of them, and which without incidental violence or intimidation, severs all business dealings with an outsider until it may secure it. If this be illegal where can we draw the line so as to countenance association to insure united, and therefore effective, action to right what seems wrong or to correct what seems an abuse, or to mark disapproval of some policy in the everyday affairs of our social life? The protest of one under threat of abstention may be unheeded, in view of the slightness of the penalty, when a like protest of many, with similar threat, is effective and only because the penalty is too great to pay. Lawful and concerted protest can regulate many things within the law without invoking paternal government. . . . It may be that the result of the boycott is a loss to him proscribed. Else the combination would fail of its purpose. But when the result sought by a boycott is to protect the members of the combination or to enhance their welfare, that loss is but the incident of the act—the means whereby the ultimate end is gained. . . . And as such a combination may be formed and held together by argument, persuasion, entreaty, or by the 'touch of nature' and may accomplish its purpose without violence or other unlawful means (*i. e.*, simply by abstention) I think it cannot be said that 'to boycott' is to offend the law."[7]

[5] *Cooley, Torts*, 3d Ed., 1906, Vol. 2, p. 587.

[6] *Toledo, Ann Arbor & North Mich. Ry. Co. et al.* v. *Penna. Co.*, 1893, 54 Fed. 730.

[7] *Mills* v. *United States Printing Co.*, 1904, 91 N. Y. Supp. 185.

This statement of the court fairly maintains the contention of the unionists that when they invoke either the strike or the boycott they are seeking to advance their own interests. They insist that modern industrial conditions not only authorize them but compel them to invoke associated effort to meet the organized strength of the employer. From the standpoint of the unionists it seems absurd that they should be enjoined from acting together in securing desirable conditions of employment in industries in which the associated owners acting through their manager—their walking delegate—determine conditions which affect thousands of workingmen.

However, the unionist does not complain of the logic of the courts, he attacks the premise upon which the argument of the court is generally made to rest, namely, that the strikers or boycotters are actuated by malicious intent. From the psychological standpoint it seems strange that the courts have so generally held that the workingmen were actuated by malice in seeking to better their conditions through associated action in a strike or boycott. To the average man, familiar with industrial conditions, it might seem as though the unionist were seeking primarily to advance his own interest in attempting to secure shorter hours, higher wages or better conditions of employment. It is generally conceded that the manager of an organized industry is seeking to promote the best interests of the stockholders or associated owners when he attempts to secure laborers at the lowest possible market price for the longest hours customary in the industries which he manages. The contention of the unionist is that the courts should likewise recognize that the laborer is seeking to better his own condition and is pursuing his own legitimate self-interest in associating with fellow laborers likewise seeking to better their industrial condition by means of a strike or a boycott. His quarrel with the court is that they have so insistently refused to recognize this motive of self-interest on the part of laborers.

That this contention of the unionists is gradually being conceded is more and more evident in recent decisions. Whether based on common or statutory law the opinions of courts are beginning to recognize that "malicious intent" may be entirely wanting in either a strike or a boycott, and that the expectation of improving their own condition may be the dominant motive which actuates the laborers in associated action.

In a decision rendered by Judge Tuley of Chicago, the right to boycott was upheld in the circuit court of Cook County as early as 1901. A certain contractor entered suit against the members of the Mosaic Workers' Union for conspiring to injure his business. The facts alleged by the plaintiff were admitted, but the construction put upon them in the complaint was denied by the defendants. They admitted sending circulars to architects, builders and contractors, setting forth that the plaintiff was the only mosaic manufacturer in Chicago who had refused to sign the agreement with the union, and that in consequence no union man would work for him. The circular further said, "we therefore request you not to let any contract to him until he has acceded to our demands. Sympathetic strikes will result on any building where he gets a contract." The question at issue was,—"Was there in these statements a wrongful attempt to injure the non-union contractor?" After summing up the evidence, Judge Tuley instructed the jury to bring in a verdict of not guilty. He declared the law bearing upon the facts to be as follows:—"The law holds that any person in competition with another may state the truth regarding the business of the other however injurious to the business of the other that truth may be. That is true of combinations and corporations as well as of individuals. The motive of making such truthful though injurious statements may be to take from the other some of his business and to add to the business of the person making those statements. The motive is a legal one. The act and the motive in this case are both legal. In other words competition is industrial welfare and injury is not the test of wrong. A man has the right to attract all the patronage he can, not only by praising his own goods, but by telling unfavorable things, provided they are true, about the goods of his rivals. He may injure them, but his method is not wrongful. The Mosaic Workers' Union simply told the truth about its relation to Davis and the consequences that would follow the letting of contracts to him. An injury may have resulted, but such an injury as the union had a legal right to inflict." Since this decision was rendered by Judge Tuley, an increasing number of decisions has from time to time upheld the legality of the boycott. In the well-known case of *Marx, etc.,* v. *Watson,*[8] the court held the boycott

[8] *Marx & Hass Jeans Clothing Co.* v. *Watson et al.* (United Garment Workers of America), 1902, 168 Mo. 133.

legal on the ground of the constitutional right of free speech. The court declared: "The fact that in exercising that freedom they thereby do plaintiff an actionable injury does not go a hair toward a diminution of their right of free speech, for the exercise of which, if resulting in such injury, the Constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring."

Though the tendency to admit the legality of the boycott in the United States has been more pronounced in decisions dealing with employers' associations,[9] and though the tremendous import of the Hatters' case,[10] and the Buck's Stove and Range case,[11] may for a while obscure the final issue, yet many lines of evidence indicate that this country will not be many years in following the lead of England and Germany in maintaining the legality of peaceable organized effort on the part of laborers to better their own condition. In the case of *Gray* v. *Buildings Trades Council,*[12] the supreme court of Minnesota modified an injunction by striking out the part which restrained the giving of "unfair" notices. In a recent Montana case,[13] the supreme court of that state held that a labor union would not be enjoined from boycotting a firm, since individuals have the right to withdraw patronage and advise others to do so when no unlawful means were employed. The Montana court adopted the language of the supreme court of New York,[14] in which that court said: "The verb 'to boycott' does not necessarily signify that the doers employed violence, intimidation or other unlawful coercive means, but it may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination or some of them, or grants concessions which are deemed to make for that purpose." In California the legality of the boycott has been upheld

[9] *Bohn Mfg. Co.* v. *Hollis et al.,* 1893, 54 Minn. 223; *Cote* v. *Murphy et al.,* 1894, 159 Pa. St. 420; *Buchanan* v. *Barnes,* 1894, 28 Atl. 195; *Buchanan* v. *Kerr,* 1894, 159 Pa. St. 433; *Macauley* v. *Tierney,* 1895, 19 R. I. 255.

[10] *Loewe* v. *Lawlor,* 1908, 208 U. S. 274.

[11] *Gompers et al.* v. *Buck's Stove and Range Co.,* 1909, 33 App. D. C. 516.

[12] *Gray* v. *Buildings Trades Council,* 1903, 91 Minn. 171.

[13] *Lindsay* v. *Mont. Federation of Labor,* 1908, 37 Mont. 264.

[14] *Mills* v. *U. S. Printing Co.,* 1904, 99 App. Div. (N. Y.) 605.

in a number of recent cases.[15] In *Pierce* v. *Stablemen's Union,* the supreme court of that state declared: "This court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer and to induce by fair means any and all other persons to do the same, and in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal." However much the recent decisions of the supreme courts in New York, Montana and California may be opposed to the weight of federal authority, they seem to point toward the future.

A comparison of federal decisions seems to indicate that the old doctrine of conspiracy—once an infallible resource in case of labor disputes—is gradually giving way to the theory of "interference with property rights" or "interference with business." This theory seems to be flourishing both under common and under statutory law. In the Danbury Hatters' case[16] the complaint alleged that the United Hatters had effectively combined to interfere with the business of the hat manufacturers and that the interstate trade of the manufacturers was being destroyed by the boycott carried on against dealers in their products in other states. The Supreme Court of the United States held that a cause of action was stated under the Sherman Anti-Trust act and remanded the case for trial on the complaint. On February 4, 1910, after a trial lasting more than seventeen weeks, the federal circuit court rendered a verdict for $220,000 against 200 members of the United Hatters of North America, in favor of the Loewe Hat Manufacturers of Danbury, Connecticut.

The decisions in the Hatters' case and in the Buck's Stove and Range cases have stirred labor leaders to renewed protests. They point to federal court decisions authorizing the use of the blacklist on the part of employers, while in the same jurisdictions the use of the boycott is denied to the unions. Commenting on this point the "American Federationist"[17] recently said: "Mark the inconsis-

[15] *Parkinson* v. *Building Trades Council of Santa Clara,* 98 Pac. (Cal.) 1040; *Pierce* v. *Stablemen's Union,* 1909, 103 Pac. (Cal.) 324.

[16] *Loewe* v. *Lawlor,* 1908, 208 U. S. 274.

[17] "American Federationist," March, 1908, Vol. 15, No. 3.

tency of the supreme court. In the Hatters' case[18] it declares that the boycott used by the workers is a conspiracy and punishable by heavy penalties. In the Adair[19] case, brought under the Erdman act, it gives a decision which will permit employers to use the blacklist as freely as they please and the wage-workers will have no redress." In the Boyer case[20] the federal circuit court for the eastern district of Missouri, said: "An employer having discharged employees for belonging to a labor union has the right to keep a book containing their names and showing the reason for their discharge and to invite inspection thereof by other employers, even though the latter, therefore, refuse to hire the discharged employees. . . . There can be no such thing as an unlawful conspiracy to destroy a labor union by discharging its members by refusing to employ them." In the Goldfield Consolidated Mines Company Case,[21] the federal circuit court for the district of Nevada similarly declared "An agreement between mine operators that they will not employ any person who belongs to a certain labor organization or to any organization affiliating therewith does not constitute an unlawful conspiracy against such organization or its members."

Unionists point out that within a period of five years after the English decisions in *Quinn* v. *Leathem*,[22] and in the Taff Vale Railway case,[23] the British Parliament acceded to the request of British trade unions by enacting the Trades Disputes act of 1906. Under this law no action can be brought against a union for conducting either a primary or a secondary boycott. Labor leaders in America are urging congressional action which will give organized labor in this country a status as favorable as that secured in Great Britain. They moreover urge that our courts shall take the advanced ground on which the German Imperial Court in 1906 recognized the legality of the boycott in Germany.[24] They constantly assert that they are not actuated by any other motive than that shown by

[18] *Loewe* v. *Lawlor*, 1908, 208 U. S. 274.

[19] *Adair* v. *U. S.*, 1908, 208 U. S. 161.

[20] *Boyer et al.* v. *Western Union Telegraph Co.*, 1903, 124 Fed. 246.

[21] *Goldfield Consolidated Mines Co.* v. *Goldfield Miners' Union No. 220 et al.* 1908, 159 Fed. 500.

[22] *Quinn* v. *Leathem*, 85 L. T. Rep. 289 (1901), A. C. 495.

[23] *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, 85 L. T. Rep. 147 (1901), A. C. 426.

[24] "Deutsche Juristenzeitung," September 15, 1906. (Translation by Ernst Freund in the Journal of Political Economy, Nov., 1906.)

the Consumers' League and similar organizations which advertise freely that they will bestow their patronage so as "to give moral and commercial support to merchants and manufacturers who afford humane conditions of employment."[25]

Leading jurists throughout our country have recently criticized the conflicting decisions[26] relating to labor disputes and have expressed the opinion that many of our labor decisions will need to be restated in order to bring them into conformity with our fundamental law.

Since the indignation apparent in the first protests has somewhat spent itself and a calmer survey of recent decisions has become possible, several lines of results are coming clearly into view. The immediate effect upon the trade unions appeared in the call to political action. When, outgeneraled by superior forces in the forties and later in the sixties and seventies, the labor movement in America turned toward political activities, certain important gains were made in legislation. It is hardly probable that the recent tendency toward political action will be allayed before amendments

[25]"Charities and Commons," Feb. 1, 1908, advertisement of Consumers' League.

[26]For leading decisions relating to boycotting, see: *State* v. *Glidden*, 1887, 55 Conn. 76; *Old Dom. S. Co.* v. *McKenna*, 1887, 30 Fed. 48; *State* v. *Stewart*, 1887, 59 Vt. 273; *Crump* v. *Commonwealth*, 1888, 84 Va. 927; *Moore & Co.* v. *Bricklayers*, 1890, 23 Weekly L. B. (Ohio), 48; *Casey* v. *Cin. T. U. No. 3*, 1891, 45 Fed. 135; *Bohn Mfg. Co.* v. *Hollis*, 1893, 54 Minn. 223; *Toledo, Ann Arbor & N. Mich. R. Co. et al.* v. *Penna. Co.*, 1893, 54 Fed. 730; *Barr* v. *Essex Trades Council*, 1894, 53 N. J. Eq. 101; *Buchanan* v. *Barnes*, 1894, 28 Atl. 195; *Cote* v. *Murphy et al.*, 1894, 159 Pa. St. 420; *Buchanan* v. *Kerr*, 1894, 159 Pa. St. 433; *Thomas* v. *Cin. N. O. & T. P. Ry. Co.*, 1894, 62 Fed. 803; *Macaulay* v. *Tierney*, 1895, 33 Atl. 1; *Vegelahn* v. *Guntner*, 1896, 167 Mass. 92; *Oxley Stave Co.* v. *Coopers Int. U.*, 1896, 72 Fed. 695; *Hopkins et al.* v. *Oxley Stave Co.*, 1897, 83 Fed. 912; *Beck* v. *Ry. Teamsters' Protective Union*, 1898, 115 Mich. 497; *Packer* v. *Bricklayers' U. No. 1*, 1899, 21 Weekly L. B. (Ohio), 223; *Boutwell et al.* v. *Marr et al.*, 1899, 42 Atl. 607; *Nat. Pro. Ass'n* v. *Cumming*, 1900, 65 N. Y. Supp. 946; *Walsh* v. *A. of M. Plumbers*, 1902, 71 S. W. 455; *Marx & Hass Jeans Clothing Co.* v. *Watson et al.*, 1902, 67 S. W. 391; *Mills* v. *U. S. Printing Co.*, 1904, 91 N. Y. Supp. 185; *Gray* v. *Bldg. T. Council*, 1905, 91 Minn. 171; *Loewe* v. *Lawlor*, 1906, 148 Fed. 924; *Loewe* v. *Lawlor*, 1908, 208 U. S. 274; *Lindsay* v. *Montana Fed. of Labor*, 1908, 37 Mont. 264; *J. F. Parkinson Co.* v. *Santa Clara Co. Bldg. Trades Council*, 1908, 154, Cal. 581; *Pierce* v. *Stablemen's Union*, 1909, 103 Pac. 324; *Buck's Stove and Range Co.* v. *Am. Fed. of Labor et al.*, 1908, 36 Wash. L. R. 822; *American Fed. of Labor* v. *Buck's Stove and Range Co.*, 1909, 33 App. D. C. 83; *Gompers et al* v. *Buck's Stove and Range Co.*, 1909, 33 App. D. C. 516.

For leading blacklisting decisions, see: *Bacon v. Mich. C. R. Co.*, 1887, 66 Mich. 166; *Mo. Pac. R. Co.* v. *Richmond*, 1889, 73 Tex. 586; *Worthington* v. *Waring*, 1892, 157 Mass. 421; *Mo. Pac. R. Co.* v. *Behee*, 1893, 2 Tex. Civ. App. 107; *Boyer et al.* v. *Western U. Tel. Co.*, 1903, 124 Fed. 246; *Joyce* v. *G. N. Ry. Co.*, 1907, 110 N. W. (Minn.) 975; *Goldfield Consolidated Mines Co.* v. *Goldfield Miners' Union No. 220 et al.*, 1908, 159 Fed. 500.

to the Sherman Anti-Trust law are enacted and a more definite status with respect to injunctions and "conspiracy" is secured. The contention of labor leaders that freedom of speech and of the press should not be enjoined will scarcely require legislative consideration, since these rights cannot be denied in courts which hold themselves within their constitutional prerogatives. The effect of the decisions upon public opinion has been enlightening. The appeal of the American unions for rights enjoyed by organized labor in England and Germany is awakening us out of our complacent toleration of situations which have been remedied in other countries. Finally the criticism offered by members of the judiciary is calling the public mind to the incongruity of fining or imprisoning laborers for peacefully combining to advance their own interests in an industrial society in which increasing organization has been the most dominant characteristic of the age. The logic of events seems to indicate that our recapitulation of England's industrio-legal experience will not be stayed before the rights guaranteed under the British Trades Disputes act, shall have been acquired by American workingmen.